IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

THURSDAY, THE 8TH MARCH 2007 / 17TH PHALGUNA 1928

Death Sentence Ref..No. 1 of 2006(D)

COMPLAINANT:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

RESPONDENT:

NYGIL FERNANDEZ.

BY ADV. SRI.THOMAS ABRAHAM
SRI.K.B.ARUNKUMAR

THIS DEATH SENTENCE REFERENCE HAVING BEEN FINALLY HEARD ON 08/03/2007, ALONG WITH CRA NO.96 OF 2006 AND CRA NO.97 OF 2006 , THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

D.S.R.NO.1 OF 2006

&

CRL.APPEAL.NOS.96 & 97 OF 2006 ()

Dated this the 8th day of March, 2007

J U D G M E N T

KOSHY,J.

Twin brothers who were accused of murdering a 17 year old daughter of their step brother faced trial for the offences punishable under Sections 427, 436, 307 and 302 read with 34 of the Indian Penal Code in S.C.No.2279/2004 on the file of the Court of Sessions, Thiruvananthapuram. Both of them were found guilty under Sections 427, 436 and 302 read with Section 34 of the I.P.C. The 1st accused was given capital punishment for offences punishable under Section 302 of I.P.C. whereas 2nd accused was given the punishment of life imprisonment. They were also sentenced to undergo Rigorous Imprisonment for 10 years under Section 436 read with Section 34 of the I.P.C. with a fine of Rs.5,000/- each. Both were also sentenced to undergo R.I. for 2 years under Section 427 read with Section

34 of I.P.C. Both were acquitted for the offences under Section 307 read with Section 34 of the I.P.C. The death sentence was awarded subject to the confirmation by this Court as provided under Section 366 (2) of the Code of Criminal Procedure and the death sentence referred is numbered as D.S.R.No.1/2006. It was heard along with Crl.Appeal.Nos.96/2006 filed by the 1st accused and 97/2006 filed by the 2nd accused.

2. According to the prosecution, deceased Sandra, her younger brother Christopher Gary Fernandez (PW2) and the accused were staying together in the residential building known as 'House of Bethlehem' at the place called Punnavoor in Maranalloor Village near Kattakada in Thiruvananthapuram District. Accused were the step fathers of deceased Sandra. PW5 father of deceased Sandra was born to the first wife of his father whereas accused were born to the second wife of his father. The name of the mother of the accused is Lilly. PW5 father of deceased Sandra is employed in Kuwait as a Senior Officer in Customs Department. He used to come home

occasionally. Mother of Sandra, Christina left the company of PW5 when Sandra was three years old. As per the evidence of PW2 bother of Sandra as well as PW5, her whereabouts are thereafter not known. At the time when Christina joined PW5 she had another daughter in the first marriage called Georgina (PW18). In PW5's evidence it was also stated that after the departure of Christina, another woman Sobha has been with him and they were living as husband and wife for two years. PW5 further stated that after the relationship of PW24, Sobha, to look after the children, he married Leona through a registered marriage. Leona was not examined. It has come out further in evidence that Leona was also stayed with deceased, PW2 and accused in that house for one month. To look after the children step mother of PW5 Lilly was also called to the house. But there was some disputes between Lilly and deceased and Lilly left the place one week prior to the incident. So at the time of incident PW3 a maid servant was staying in the house to look after the children, for preparing the food etc. It has also come out in evidence that the residential

house had a big compound wall and six ferocious dogs were also kept in the house and those dogs were looked after by A1. Extent of the property is only 9 cents. A1 and A2 had no job or any other income. PW5 was looking after the accused, deceased etc. It is also stated that before one month of the incident A1 get a job as a waiter. On the fateful day, 3.8.2004 it was a harthal day and therefore PW2 did not go to the School. Due to some problems the deceased stopped going to the School and she was living in the house itself. Because of the harthal A1 also did not go to the work and all of them were in the house on that day. In the evening A1 went out and returned with bread and milk for the supper. By about 8 p.m. supper was ready. Accused and Christopher went for supper. Sandra did not join them and thereafter it appears that there was some quarrel picked up with the accused and the deceased and accused were telling that she was responsible for sending Lilly their mother out of the house by her father Joseph (PW5). First accused went to the kitchen and took a long knife and caught hold of Sandra by her neck and held the knife on

her abdomen. When Christopher tried to prevent from doing harm to Sandra 2nd accused caught hold of Christopher. After releasing Sandra and Christopher both accused destroyed all the household items like T.V., Speaker, Phone etc. available in the dining hall. Simultaneously 2nd accused asked the 1st accused to let loose all the six dogs. 1st accused went to the courtyard and did so. When one dog by name 'Rockey' came running Sandra, Christopher and maid servant Lalitha ran to the kitchen and went inside a bathroom adjacent to the kitchen and bolted the door from inside. Immediately both accused came and kicked at the door of the bathroom. While Sandra was opening the door, accused beat Sandra and kicked on her abdomen and dragged her from the bathroom by catching hold of her lock of hair. Sandra and Christopher cried aloud for help. In the meanwhile both accused went into the kitchen and lighted the gas stove. They brought bedsheets and pillows to the kitchen and after lighting it on the gas stove, put it in all the rooms of the house. The household articles in the rooms including plastic chairs and carpet caught fire. Christopher

then went inside the kitchen and put off the gas stove. As fire and smoke filled the house, Sandra, Christopher and the maid servant opened the outer door of the kitchen to come out of the house. But they found the dogs out and Sandra and Christopher tried to hide near the well in the courtyard. Maid servant Lalitha entered into an old kitchen room outside the main building and tried to hide there. When the house caught fire electric supply went off. As Sandra and Christopher took shelter on the outer protective wall of the well close to the compound wall, the accused saw them and immediately 2nd accused came over there and kicked Sandra. In the mean while 1st accused took out an axe from nearby and struck Sandra on her abdomen with its blund portion. Sandra screamed aloud and sat on the protective wall of the well. Christopher was able to wrest the axe and threw it in the well. Christopher also helped his sister Sandra to sit on the wall of the well. But 1st accused came there and hit Sandra's head against the compound wall. At that time 2nd accused pushed her in the gap between the well and compound wall.

1st accused went to the old kitchen room and came with a sharp edged chopper which is identified as MO1 and then he indiscriminately struck Sandra on the back of her head with the sharp edged portion of MO1 chopper. Sandra screamed aloud for a while and then became silent and both of them together pushed her into the well. When the accused went away from there Christopher climbed on the protective wall of the well and cried aloud for help calling his neighbours. PW1 Ratheesh and another Ratheesh (PW11) came outside the compound wall and asked Christopher to jump over the compound wall. Christopher thus jumped the compound wall and came out. He was taken to the nearby house of PW1, who then proceeded to Malayinkeezhu Police Station and gave the First Information Statement (Ext.P1) on the basis of which crime was registered by the police. F.I.Statement was given at 10.30 p.m. on the same day. Police and Fire force came there during the night itself. Sub Inspector of Police (PW32) and others tried to put out the fire. The dead body was inside the well, which is having a depth of about 40 feet. They were not able to retrieve the

dead body of Sandra. Both the accused were taken to the Police Station by the S.I. Of Police. Then investigation was thereafter done by the Circle Inspector of Police, Kattakada. On the next day police came to the house of Bathlehem and retrieved the dead body with the help of PW19. After preparing the inquest report the dead body was sent for post mortem examination.

3. Apart from the medical evidence, prosecution mainly relied on the direct evidence of PW2, brother of the deceased and PW3, maid servant who were inside the residential house at the time of incident. Ratheesh, PW1 gave F.I.Statement. PW11 is the person who along with PW1 helped Christopher for an escape. Apart form the above, their father Joseph who came from Kuwait within two days of the incident, Sobha who lived with them for some time, the neighbours etc. were examined to corroborate the evidence given by PWs.2 and 3. In 313 statement the accused denied their involvement completely. All the incriminating circumstances were denied. The trend of

cross examination was to suggest that the deceased might have committed suicide. Allegations were also raised against PW5, father of the deceased as well as one Naveen, PW25 and his friend Hashim.

4. Since the death reference is a referred trial, we will consider the evidence adduced by all the main witnesses in this case. Before going into the evidence of the occurrence witnesses we will first deal with the medical evidence. PW26 is the Doctor who conducted post mortem examination of deceased Sandra. He issued Ext.P20 Post mortem certificate. It was stated in the post mortem certificate that the deceased was a moderately nourished young female of height 155 cm. and weight 48 kg. medium complexion. It was also noted by the Doctor as follows:

> "Pubic area was shaven. External genitalia was gaping. Vagina admitted two fingers loose. Hymen showed tears at 5 to 7 o'clock position. Anus was dilated with multiple old scars at periphery. Mucosa of anal and vaginal canal ironed out."

Following anti mortem injuries were noticed by the Doctor:

1. Abdraded contusion 4 x 2 x 0.4 cm. on the forehead, 1 cm. to left of midline and just above the eyebrow.

2. Incised wound 10 x 1.5 cm. bone deep oblique on back of head, the upper innner end 4.5 cm. to right of midline and 5 cm. below the level of occiput. There was a side cut 2.5 x 1 cm. bone deep obliquely involving the outer margin of the wound, 6 cm. below its upper end.

3. Incised wound 6 x 0.5 x 1.5 cm. on back of head, 2 cm. below the parallel to injury No.2.

4. Incised wound 8 x 2 x 3 cm. oblique on the back of neck, the lower inner end 2.5 cm. to right of midline and 9 cm. below the level of occiput.

5. Incised wound 5 x 1 x 1 cm. oblique on back of neck, almost parallel to injury No.4, its lower inner end 2 cm. below injury No.4.

6. Incised wound 9.5 x 3 x 3.5 cm. oblique, on back of neck, 2 cm. below and parallel to injury No.5 with a side cut 3 x 1 x 2 cm. involving its lower border, 4.5 cm. below its outer end.

7. Incised wound 2 x 1 x 2.5 cm. oblique on the back of neck, connecting the adjacent borders of injury Nos.5 and 6 its upper outer end 2.5 cm. outer to the inner end of injury No.5.

(The depth of injuries 4,6 and 7 were directed forwards and to left.)

8. Incised wound 6.2 x 1 cm. bone deep, oblique, on top of head the front left lower end 1 cm. to left of midline and 9 cm. above the level of root of nose. It has made a cut 5 cm. long on the underlying bone to lift a chip of bone 5 x 1.5 x 0.3 cm. forwards and to right.

9. Incised wound 7.5 x 1.5 cm. bone deep, oblique on left side of head, the lower front and 8 cm. abovo the ear. Underneath the skull bone was found cut, 04 cm. deep directed downwards and to left.

10. Contusion 8 x 4 x 0.4 cm. on top of back of head, 5 cm. above the occiput.

On dissection, brain showed sub arachnoid hemorrhagic over the left side of cerebral hemisphere, top of right frontal lobe and under surface of both frontal and temporal lobes.

11. Incised wound 4.5 x 1.5 cm., oblique on back of right wrist the lower outer broad end was 6 cm. above the root of index finger. The back aspect of the bone (radius) was found cut reflecting a chip of bone 1.8 x 1 x 0.3 cm. upwards.

12. Incised wound 2.5 x 1 x 0.4 cm. on the back and outer aspect of right wrist.

13. Incised wound 1 x 0.3 x 0.3 cm. on the back and outer aspect of right wrist 0.5 cm. above injury No.12.

14. Incised wound 2 x 0.5 x 0.3 cm. on the inner aspect and front of right wrist 7 cm. above root of little finger.

15. Abrasion 10 x 5.5 cm. oblique on left side of chest the upper front end 13 cm. below armpit in mid axillary line.

16. Abrasion 2.5 x 1 cm. left side of trunk, 4 cm. Above rim of hip bone.

17. Abraded contusion 1.5 x 1.5 x 0.5 cm. on outer aspect of left thigh 7.5 cm. below rim of hip bone.

18. Abrasion 0.5 x 0.5 cm. on front of abdomen, 3.5 cm. to right of midline and 8.5 cm. below the costal margin.

After considering Ext.P21 and Ext.P22 Chemical examination report, it was stated that no poison was detected in the viscera materials. Semen and spermatozoa were not detected in the anal and vaginal swabs and smears. Injury Nos.2 to 9 and 11 to 14 are incised wounds and they can be caused by MO1 chopper. Injury Nos.1 and 10 could be caused by coming into contact that part of the body with the ring in the well. Injury Nos.15, 16, 17 and 18 could be caused by coming into contact with any hard and rough object or surface. Injury Nos.8 and 9

are independently sufficient in the ordinary course of nature to cause the death of the victim. According to the doctor she died on account of head injury and drowning. The Doctor also answered in cross examination as follows:

> "(Q.) During autopsy I found definite features of vaginal and anal penetration. I said it because there were multiple old tears in the hymen, and the Anus was dilated. Mucosa of anal and vaginal walls were ironed out (A). The victim had previous sexual intercourse through vaginal and anns. The sexual intercourse could have occurred minimum two days prior to the date of death if the acts were not protected by condom. The tears and hymen were old and healed. That the tears in the hymen were old did not find a place in your post mortem certificate (Q). Usually the hymen will heal by 5 to 7 days (A). The sexual history of the person can be understood from the observations in Ext.P20 certificate beginning from 'External genitalia was gaping and ending with vaginal canal ironed out"

Even though serious questioning was done the defence was not able to bring home that this might be an incident of suicide. The deposition of the doctor that Injury Nos.8 and 9 are independently sufficient in the ordinary course of nature to

cause the death was not cross examined at all. The above injuries are not self inflicted.

5. We will come to the evidence of PW1. He is a close neighbour to the house of the deceased. According to him on 3.8.2004 by 9 p.m. he went for sleep. Then his mother (PW4) called him and told him that she saw the fire and heard noises from the nearby house. He went outside and saw fire and heard cries from the house of Bethlehem. Some others also gathered there. In view of the big walls, they were unable to go inside the house of Bethlehem. Then he saw PW2 crying and lifting his hand from near the well. He and PW11 asked PW2 to jump. He jumped and he told them that A1 and A2 pushed his sister inside the well. Neighbours gathered there. Inside the house there was only PW2, A1 and A2 and maid servant PW3. He went to the police station and gave F.I.Statement. His evidence is fully corroborated by evidence of PW2 and his mother PW4 Sarojam, PW11 Ratheesh, PW14 and PW15.

6. PW2 eye witness, brother of deceased, described the incident in accordance with the prosecution case. PW2 also deposed that quarrel took place on accused stated as follows:

Evidence of PW2 is correctly analysed by the trial judge as follows:

> "PW2 Christopher is the prime witness examined by the prosecution to prove its case. He witnessed the whole occurrence. He narrated the incident so clearly and in a lucid manner. Though he was aged only 14 years at the time of the occurrence and 15 years at the time of his examination in court, his deposition in court was very mature and clear. He narrated the sequence of events which culminated in the death of his sister Sandra. It was around 8.30 p.m., on the fateful day there was a heated exchange of words between the accused both on one side and deceased Sandra on the other. PW2 stated before court that following the exchange of words the first accused took out the knife from the kitchen and after holding Sandra tightly, the knife was held at her abdomen

telling her that she would be killed. Sandra is stated to have sustained a bleeding injury on her abdomen. When PW2 tried to prevent the first accused from doing harm to Sandra, second accused Trever is stated to have held PW2. Although Sandra and PW2 cried aloud no one came to their rescue. It is in the evidence that the compound wall of the house is built in such a height that the outsiders were not in a position to see what is going on inside the compound wall. Both accused are stated to have committed acts of violence and destroyed the household items like T.V., speaker, phone etc. in the dining hall of the house. There were six ferocious dogs, all in the Rot Wheelter species in the house, as being grown by Nygil. Second accused Trever is stated to have asked first accused Nygil to let loose all the six dogs. Seeing the dogs running towards the house, Sandra along with Christopher and house maid Lalitha took shelter in a bathroom adjacent to the kitchen. It is in the evidence of PW2 that, except Nygil who was feeding the dogs, the other inmates in the house including the housemaid had no contacts or acquaintance with the dogs. After the dogs were let loose the accused both followed Sandra and dragged her from the bathroom. Both the accused are stated to have slapped on the face of Sandra. The first accused thereafter went into the kitchen and after lighting the gas stove set fire to bed sheets and pillows and those torched articles were placed in different rooms in the house. The evidence of PW2 supported by that of the housemaid examined as PW3 will go to show that the household articles caught fire and all the rooms including the kitchen were filled with smoke and fire. The neighbours, saw the fire and smoke coming through the air hold of the house. But if the evidence of the neighbours who were examined before court as Pws.1,4,11,13,14 and

15 is any indication they could only gather outside the compound wall unable to make their into the house, by reason of the fact that the dogs were let loose and also because the compound wall was very high. Frightened by the fire and smoke and six ferocious dogs, deceased Sandra as also PW2 and PW3 managed to come out of the kitchen. While the maid servant Lalitha hide in the old kitchen, PW2 and Sandra made an unsuccessful attempt to hide near the well. But seeing Sandra and PW2, both accused followed them. The first accused Nygil is stated to have dealt a blow with the blunt portion of MO2 axe on the abdomen of Sandra. The evidence of PW2 will go to show that deceased Sandra was kicked, dragged and pushed on the ground by both accused. Not being satisfied with all what they did, first accused Nygil went inside the old kitchen where the maid servant was hiding and came back with MO1 chopper which was being used in the house for the purpose of slicing meat for the dogs. By then Sandra was lying on her belly on top of the western protective wall of the well. She was of course assisted by PW2 as well. The first accused is then stated to have indiscriminately inflicted cut injuries on Sandra on the back of her head. The scream she made was heard by the housemaid who was hiding in the old kitchen. After a while Sandra became silent, upon which both accused are stated to have come and pushed her into the well. PW2 thereafter managed to stand up the protective wall of the well and cried for help. The neighbours who gathered outside the compound wall heard him crying and they came to his rescue. Pws.1 and 11 are stated to have rescued PW2 and he was taken to the house of PW1. After which PW1 went to the police station and gave the F.I.Statement. Simultaneous with his jumping the compound wall PW2 informed the neighbours that his

> sister was murdered by the accused and pushed into the well."

Even though he was severely cross examined, his evidence was not shattered and the trial Judge who saw the demeanour of the witnesses believed his evidence as truthful. Evidence of PW2 was fully supported by the evidence of PW3, housemaid who was present in the house and fully corroborated by the evidence of PWs.1, 11, 14, 15 etc. Their evidence would clearly show that at the time of incident the only persons present inside the residential house compound was accused, deceased, PW2 and PW3. No suggestion was also put to PW2 or PW3 that they are responsible for the incised injuries on the deceased and no suggestion that anybody else were inside the residential building. That will completely prove the involvement of the accused in the house.

7. PW5 is the father of the deceased. He deposed that at the time of occurrence, (3.8.2004) he was in Kuwait. On being informed by PW2 from the house of PW15,

Jaya sister of PW4 and Sarojam mother of PW1, he started from Kuwait in the night of 4.8.2004 and came to the house on 5.8.2004 morning. He also deposed that Christina mother of the deceased left her and her whereabouts are not known. Her daughter before his marriage is Georgina. Accused are his step brothers. Their mother is Lilly. He returned to Kuwait only on 23.6.2004. At that time Lilly was also there. On 27.2.2004 when he telephoned Lilly informed that she is not willing to stay in the house. In the evening Sandra told that Lilly left. On 28.7.2004 she told him that she got a maid servant. On 3.8.2004 he telephoned at 9 a.m. and talked with A1 etc. In the evening he again telephoned but he was not able to get connection. Then he telephoned to neighbour Sheeja's house and her husband informed him the details and told him that PW2 is in the house of PW4. Then he telephoned to the house of PW4 and PW15 sister of PW4 took the same. Then PW2 informed the details. In cross examination he stated that deceased never complained that the accused sexually harassed her. He

also stated that earlier Georgina his step daughter was staying there in that house and there was a complaint that the accused harassed her and a case was also registered. He further stated with regard to the stay of Sobha and Leona in that house. He also submitted that after Leona left he went to the marriage bureau for advertising for another marriage. Scandalous allegations put by the counsel for the accused was that he had sexual relation with the daughter was totally denied by him and also with the suggestion that she had committed suicide because of that was also denied.

8. During the course of incident, A1 and A2 had also suffered injuries. A1 was examined by PW9, Doctor on 6.8.2004 at 10.50 a.m. The following injuries were incurred by him:

1. Multiple small abrasions over an area of 2 x 1.5 cm. on the left cheek.

2. Linear abrasion 3 cm. long, oblique on the right side of back of neck, lower inner end being 2.5

cm. outer to root of neck.

3. Multiple small abrasions over an area of 3 x 1 cm. on the right side of front of neck 7 cm. outer to midline and 3 cm. above the collar bone.

4. Crescentic abrasion 1 cm. long on the left side of front of neck, 3 cm. below the angle of jaw, with its convexity seen directed upwards and outwards.

5. Linear abrasion 0.5 cm. long, almost horizontally placed, on the right side of front of neck, with its inner end 4 cm. outer to midline and 3 cm. below the lower jaw.

6. Linear abrasion 3 cm. long, obliquely, on the front of right shoulder.

7. Abrasion 7 x 2 cm. oblique, on the right side of back of trunk, with its upper outer extent 13 cm. outer to midline and 13 cm. below the top of shoulder.

8. Multiple small abrasions over an area of 1 x 1 cm. on the right side of back of trunk 2 cm. outer to midline and 15 cm. below root of neck.

9. Multiple small contusions of sizes varying from 0.3 x 0.2 cm. to 2.5 x 0.5 cm. over an area of 11 x 8 cm. across the middle of back of trunk, 7 cm. below root of neck.

10. Multiple linear abrasions of length varying from 0.3 x 1.5 cm. over an area of 6 x 5 cm. haphazardly placed on the middle and adjoining left side of back of trunk 4 cm. below root of neck.

11. Graze abrasion 2 x 1.5 cm. on the left side of back of trunk, oblique, with its inner lower end 1.5 cm. outer to midline and 15 cm. above the natal cleft.

12. Contusion 7 x 5 cm. across the middle of back of trunk, 4 cm. above the natal cleft.

13. Contusion 1.5 x 1.3 cm. on the left side of front of chest 5 cm. outer to midline and 7 cm. below the collar bone.

14. Multiple small abrasions over an area of 3 x 1.5 cm. on the back of right elbow.

15. Contusion 3 x 0.5 cm. on the back of right forearm, 3 cm. below the elbow.

16. Abrasion 0.3 x 0.1 cm. on the back of right hand, 1.5 cm. above root of ring finger.

17. Graze abrasion 2 x 2 cm. on the outer aspect of right knee.

18. Abrasion 2 x 0.7 cm. on the front of right leg 9 cm. below the knee.

19. Multiple small abrasions over an area of 3 x 2 cm. on the front of right leg 5 cm. below the knee.

20. Multiple small abrasions over an area of 9 x 4 cm. on the front of left leg 4 cm. above the ankle.

21. Abrasion 1 x 1 cm. on the front of left knee.

22. Two abrasions 0.7 x 0.4 cm. and 0.5 x 0.5 cm., one below the other and 2 cm. Apart, on the

back of left forearm near its inner border, 3 cm. above the wrist.

23. Linear abrasion 1.5 cm. long, on the front of left forearm 6 cm. above wrist.

24. Abrasion 1 x 1 cm. on the back of left elbow.

25. Graze abrasion 2 x 1 cm. on the inner aspect of left elbow.

26. Contusion 2 x 1 cm. on the back of left arm just above the elbow.

The history and alleged cause of injuries as stated by A1 in Ext.P9 wound certificate is as follows:

> “The injuries were sustained during a violent tussle between him and a girl named Sandra, wherein she had forcibly grasped his neck and also forcibly coming into contact with the walls and by falling and struggling on the ground on the night of 3.8.2004.”

He also stated that he conducted potency examination of A1 and found that he was potent by Ext.P10 certificate.

9. PW.8 Doctor examined A2 and issued Ext.P8 certificate which is stated as follows:

> 1. Contusion 1 x 0.5 cm. on right side of forehead 2.5 cm. outer to midline 1 cm. above eyebrow.
>
> 2. Multiple small abrasion 0.5 x 0.5 cm. to 1 x 1 cm. over an area 6 x 4 cm. on right side of back of chest 8 cm. outer to midline 4 cm. below top of shoulder.
>
> 3. Contusion 5 x 3 cm. on right side of back of chest 2 cm. outer to midline 16 cm. below root of neck.
>
> 4. Abrasion 1 x 0.1 cm. on left side of back of chest 3 cm. outer to midline 1 cm. below root of neck.
>
> 5. Abrasion 3 x 0.3 cm. on left side of back of chest 5 cm. outer to midline 5 cm. below top of shoulder.
>
> 6. Abrasion 1.5 x 0.2 cm. on left side of back of chest 12 cm. outer to midline 3.5 cm. below top of shoulder.
>
> 7. Contusion 4 x 1 cm. on left side of back of chest 3 cm. outer to midline 17 cm. below root of neck.
>
> 8. Abrasion 1 x 0.5 cm. on left side of back of chest 9 cm. outer to midline 17 cm. below top of shoulder.

9. Abrasion 2 x 0.1 cm. oblique, on left side of back of chest, its upper inner end 9 cm. outer to midline 22 cm. below top of shoulder.

10. Contusion 7 x 4 cm. on right side of back of trunk 1 cm. outer to midline 30 cm. below root of neck.

11. Contusion 8 x 1 cm. horizontally placed on left side of back of trunk, its inner end 1 cm. outer to midline 33 cm. below top of shoulder.

12. Abrasion 6 x 0.5 cm. oblique on right side of back of trunk its upper inner end 5 cm. outer to midline 31 cm. below top of shoulder.

13. Multiple small abrasions over an area 7 x 3 cm. on right outer aspect of abdomen overlying top of hip bone.

14. Multiple small abrasions over an area 9 x 8 cm. on the outer aspect of right arm just above elbow.

15. Abrasion 6 x 0.3 cm. on back of right fore arm 3 cm. below elbow.

16. Abrasion 8 x 1 cm. on outer aspect of left arm 6 cm. above elbow.

17. Multiple small abrasions over an area 8 x 4 cm. on inner aspect of left knee and adjoining part of leg.

18. Abrasion 3 x 0.5 cm. on front of left leg 13 cm. below knee.

19. Multiple small abrasions over an area 5 x 4 cm. on right buttock.

The history and alleged cause of injury were stated as follows:

> "On the night of 3.8.2004 his brother had a quarrel with Sandra (his brother's daughter), which ended up in a scuffle and he tried to separate them. Meanwhile, the dog attacked him and he fell down and sustained the injuries."

He deposed that A2 himself has given the above history. It is pertinent to note that doctor specifically stated that even though police brought them, A1 and A2 stated the cause of injuries. PWs.8 and 9 Doctors also deposed that cause of injuries were stated by A1 and A2 themselves. Since the cause of injuries stated by them are not confession, it is admissible in evidence and it is not to be excluded by Section 26 of the Evidence Act. We are of the opinion that story given by them also is in support of the prosecution that they were involved in the incident and these are mainly defence injuries

caused to them when the deceased and PW2 were attacked.

10. Magistrate who recorded 164 statements from PWs.2 to 6 was also examined. D1 to D6 marked by defence to prove contentions in 164 statement are not materials to this case. PW18 Georgina step sister of the deceased was examined to prove that while they were staying in Bathlehem accused used to harass her and assaulted her. The complaint (FIS) filed by her were marked as Ext.P15. She also stated that when PW5 went back to Kuwait, because of the complaint, he gave Rs.1,000/- each to A1 and A2 and asked them to go to Ernakulam. But they did not go. PW19 was the person who took the body as well as MO2 axe from the well. PW24 Sobha described their alleged relationship with the deceased and also stated that she lived in the house for some time along with her daughter Priyanka. She also stated that she lived with PW5 as husband and wife and on her own will they decided to live apart. PW32 recorded the F.I.Statement and PW33 conducted the investigation. On the basis of the confession statement

given by A1, MO1 was found out from the hiding place of the old kitchen room. According to the Police Officers even though accused were in the upstairs when they seized them at 10 p.m. their arrest was recorded only after two days and even though they were having injuries they were not sent to the Doctor. The defence suggestion put forward to PW33 was that the deceased had some relations ship with one Naveen (PW25) and when Sandra decided to go with Naveen that was being objected by the accused and the deceased tried to commit suicide and she intentionally caused injuries to her right hand while sitting on the side of the well. The questions and answers recorded are as follows:

If such self inflicted injury was caused, it ought to have been find a place in the post mortem certificate also. Thus all suggestions itself clearly shows the involvement of the accused and that fatal injuries seen on the deadbody as can be seen from the post mortem certificate are not self inflicted injuries in a bid to commit suicide.

11. The totality of the evidence shows that the injuries were caused by A1 and A2. An attempt was made to show that A2 was innocent. We have already seen through the evidence of PW2 saying that

The evidence also shows that A1 and A2 were responsible for the incident even though recovery of MO1 was effected through A1. PW3 stated that the incised injuries were caused by A1, PW2 stated that both of them together had done it. In fact A2 asked A1 to open the door and it is A2 who obstructed PW2 in rescuing his sister. Both are equally involved in the crime and we have no doubt that A1 and A2 together are responsible for the incident. It is A2 who asked A1 to let loose the dogs. In furtherance of the common intention, the crime was conducted. Whether A1 and A2 together pushed the deceased to the well as deposed by PW2 or she fell down because of the bleeding injuries sustained, is not very important as the incised injuries especially 8 and 9 itself were sufficient in the ordinary course to cause death and it was inflicted by A1 and A2. Even if it was caused by A1 sufficient help was given by A2 also and A2 also participated in the crime in furtherance of their common intention and his overt acts were deposed by PW2. According to the counsel for the defence, even if they are found guilty it can be seen from the

evidence of PW2 and 3 that deceased have no previous enmity towards the accused. On the fateful day while A1 and A2 started dinner deceased did not come for dinner and because of telling of some obscene words by accused in malayalam, some clashes have started and there was no previous plan to murder the deceased. The knife was taken from the kitchen and it is not made and kept as a weapon for killing the deceased. It was suggested by the counsel for the accused that their mental makeup was not normal and they are entitled to get the benefit of insanity. But no such suggestion were put during the trial. It is true that their behavior was strange. But every criminal who kills their near relatives are not normal but that is not legal insanity. Accused were not under treatment for mental illness. It is not that they were not aware of what they were doing. They tried to kill the deceased by setting fire. But she somehow escaped from the house and thereafter the incident occurred. We see no ground to interfere in the conviction ordered by the trial court for offence punishable under Sections 427, 436 and 302 read with Section 32 of the

I.P.C. which are proved against the accused beyond reasonable doubt by concrete evidence.

Sessions Court found that A1 and A2 are together responsible. But A1 was awarded capital punishment and A2 was awarded only life imprisonment. We have considered the various aspects to find that the offence was committed by A1 and A2 in furtherance of common intention. Death punishment can be imposed only in rarest of rare cases and normal sentence for offences punishable under Section 302 is life imprisonment. Before imposing death punishment, court has to consider mitigating and aggravating circumstances as mentioned in ***Bachan Singh v. State of Punjab (A.I.R. 1980 S.C. 898)*** and ***Machhi Singh and others v. State of Punjab (A.I.R. 1983 S.C. 957)***. It is true that they have committed a very heinous offence of killing their own step daughter who was entrusted with them for her well being. She was brutally killed by setting fire and putting finally into the well after inflicted with fatal incised wounds. But we note that

there was no previous enmity between deceased and accused. Their relationship was cordial as can be seen from the evidence of PWs.2, 3 and 5. PW5 father of the deceased deposed that before the incident deceased never complained against A1 or A2. Something happened at about 8.30 p.m. on that day. Evidence of PW5 would show that he was also leading an immoral life living with various women and again advertised for marriage in matrimonial column and he should not have entrusted his 17 year old daughter with the two young step brothers below the age of 22. That too in a house of 9 cents with a big compound wall and six ferocious dogs. We also note that the 17 year old girl was compelled to stop her studies due to various reasons and her relation with boys like PW25 are proved. Medical evidence also shows that she was not virgin. Considering the various mitigating and aggravating aspects and considering the age of the accused, we are of the opinion that even though offence committed is brutal, it is not a rarest of rare case that warrants death punishment on A1. Considering the fact that accused was aged below 23 years

and it was not a preplanned murder and there is time for reformation for the accused etc., while confirming the conviction, we set aside the capital punishment imposed on A1. He is sentenced for imprisonment for life with a fine of Rs.10,000/- for the offences punishable under Section 302 of I.P.C. On default of the payment of fine, he has to undergo Imprisonment for 6 months in case remission or commutation of sentence of life imprisonment. We also note that considering the nature of evidence, no remission or commutation of sentence shall be given to the accused before undergoing 14 years of imprisonment as provided under Section 433 A of the Cr.P.C. We are not interfering in the sentence passed on A1 for other offences and confirm the sentence awarded on A2. Death reference is answered accordingly. Appeal filed by A1 (Crl.A.No.96/2006) is partly allowed. Appeal filed by A2 (Crl.A.No.97/2006) is dismissed.

J.B.KOSHY, JUDGE

T.R.RAMACHANDRAN NAIR, JUDGE

prp

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

O.P.NO. OF 2006 ()

J U D G M E N T

1th January, 2007